89- 1454

Supreme Court, U.S.
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NO.

In the Supreme Court of the United States

OCTOBER TERM, 1990

JAMES HAMILTON,

Petitioner

VERSUS

STATE OF MISSISSIPPI,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF MISSISSIPPI

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QUESTION PRESENTED

Whether or not the United States Constitution Amendment Four permits law enforcement officers to knowingly search a building different from the building specified in the warrant when the same person owns both buildings which are adjacent?

TABLE OF CONTENTS

Questions Presented i
Table of Contents ii
Table of Authorities iii
Opinion Below 1
Jurisdiction 1
Rules of Criminal Procedure Involved 1, 2
Statement of the Case 2
Argument

THE WRIT SHOULD BE GRANTED, SINCE THE MISSISSIPPI SUPREME COURT REFUSED TO FOLLOW A DIRECTLY CONTROLLING DECISION OF THIS COURT, AND SINCE GRANTING THE WRIT IS THE ONLY WAY IN WHICH THIS COURT MAY COMPEL THE STATE COURTS TO FOLLOW ITS DECISION 6

APPENDIX A 14

APPENDIX B 16

TABLE OF AUTHORITIES

CASES Page

Keiningham v. United States, 287 F. 2d 126 (D. C. Cir. 1960) 9

Maryland v. Garrison, 480 U. S. 79, 94 L. Ed. 2d 72, 107 S. t. 1013 (1987) 6, 9, 12

Michigan v. Tyler, 436 U. S. 499, 56 L. Ed. 2d 486, 98 S. Ct. 1942 (1978) 11

Mincey v. Arizona, 437 U. S. 385, 57 L. Ed. 2d 280, 98 S. Ct. 2408 (1978) 11

Stone v. Powell, 428 U. S. 465, 49 L. Ed. 2d 1067, 96 S. Ct. 3037 (1976) 11, 12

United States v. Heldt, 668 F. 2d 1238, 1262 (D. C. Cir. 1981) 9

United States v. Kaye, 432 F. 2d 647, 649 (D. C. Cir. 1970) 9

CONSTITUTION INVOLVED

Fourth Amendment, United States Constitution ..... Passim

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OPINION BELOW

The opinion of the Mississippi Supreme Court will be reported in the Southern Reporter.

JURISDICTION

This Court has jurisdiction to review the decision of the Mississippi Supreme Court entered on January 17, 1990, upholding the criminal conviction of James A. Hamilton. This Court has jurisdiction to review by Writ of Certiorari under 28 USC Sec. 1257 (3).

CONSTITUTIONAL PROVISION INVOLVED

The constitution provision involved is United States Constitution Amendment Four, which says:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable

searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

STATEMENT OF THE CASE

On September 2, 1986, various law enforcement officers executed a search warrant directing them to search a two story building owned by the Petitioner, James Hamilton:

> "From Highway #82 in Starkville, proceed north on Montgomery Street past the city limits and continue north on Rock Hill Road. Proceed in this direction for 3.1 (approximately) miles. On the left is a two story building, white with maroon trim with a concrete basketball court in the front. This building is on the west of Rock Hill Road. This is the dwelling to be searched."

State Exhibit "2"; R. 155-156.

The officers did not limit themselves to a search of the above-described place. Instead of limiting themselves to the two story building described in the search warrant, the officers also searched an adjacent one story house also owned by James Hamilton. One of the officers, Westbrook, described the search as follows:

> "Q. What building did you search at that place and time?
> A. We searched all the buildings on the property controlled by Hamilton...." R. 187-188.
> Q. Officer Westbrook, what building was identified on the warrant that you served on Mr. Hamilton?
> A. A two story. A two story building.
> Q. Alright. And you served that warrant in a one story building with a basement, didn't you?

A. We searched all the buildings on the property, the two story building included...."

R. 343-344.

The officers found no evidence of a crime in the two story building which the search warrant authorized to be searched. The crucial evidence (marijuana and a large volume of money) was found underneath the one story house. As explained by Officer Westbrook:

"Q. Did you not testify here today that you executed the search warrant, which has been offered into evidence here today?
A. Yes, sir. I executed that warrant.
Q. Alright. Was that warrant for a building or for several buildings?
A. It was for the residence of James Hamilton.
Q. Alright. How many buildings did you search?
A. To the best of my recollection, there are three, coining the phrase loosely, buildings. There are three.
Q. How many of those are two story buildings?
A. One of them.
Q. Alright. And how much marijuana did you find in that two story building?
A. None."

R. 195.

The Petitioner, Hamilton, specifically brought to the attention of the officer in charge of the search (Oktibbeha County Sheriff, Dolph Bryan) that the warrant did not author-

ize the search of the one story residence. According to Hamilton (in testimony which was not contradicted by Sheriff Bryan), the following occurred:

> "The Sheriff told me, 'James, I have a search warrant to search your place.' And I at that time, asked the Sheriff, 'May I read the search warrant?' And he said, 'You may.' And I was reading the search warrant. And while I was reading it, one of the agents, Ricky Peterson, threw a tennis in my single story residence, and he told his dog to go sic the ball. When the dog ran in the single story residence to sic the ball, Steve Westbrook and Officer Charlie McVey and other officers that was unknown to me at this time and that time they all came in. And I was still trying to read the search warrant. And so I got through reading the search warrant. And the search warrant–I told Sheriff Dolph Bryan, I said, 'Sheriff, this warrant states that it's the two story apartment building with the concrete basketball on front in which you're supposed to be searching, and your supposed to be looking for cocaine and marijuana up there.' And officers-at–at this time there was even more officers came from around the south end of the single story dwelling. And Sheriff Bryan told me, 'James, make it easy on yourself and let me do my job the way I see fit. <u>This warrant is good for where ever I say so</u>"....And so they started searching. And the very first initial search took place in my bedroom, which is right to the left of the southeast end of the single story building. And Charlie McVey, along with a dog, they went into the bedroom. The first spot they checked was to the right of the bedroom. I had this little wooden box I had just made. It was–I kept all my personal bills and stuff in it. And he looked in it, the dog looked in it and snuffed in it. They went up under my bed. They went through the dresser drawers. They went through the closet. And at that time, Steve Westbrook went in to the kitchen and started emptying out coffee, cornmeal, sugar, and so they came out of the bedroom. They had found nothing. And Charlie McVey then went into the kitchen with Steve Westbrook and the

dog, and at this time Sheriff Dolph Bryan, along with two or three deputies and Rickey Peterson said, 'Let's take the dog now, we're going to go and open up the'. He said–asked me did I have the keys to the downstairs and upstairs portion of the two story building. He said,'Now we'll go and search the two story dwelling.' And we went to the two story building and we began in the garage. He searched the two story dwelling and the garage. He ran the dog through and then he went upstairs. And he went through everything upstairs. The dog went through everything upstairs. And he said, 'Okay, you can lock it up now.' And then he told me he went back downstairs and on the northeast end of the single story dwelling I have a storage room. he said, 'Do you have a key to this?' I said, 'Yes.' He told me to unlock it. Again, at this point, I say, 'Sheriff, this warrant states clearly that what they're looking for is a two story dwelling what trimmed in maroon with a concrete basketball in front. And it stated that this is the dwelling to be searched. And it stated that you're looking for cocaine and marijuana along with all marijuana and contraband.' I said, 'We've searched the place, there was nothing there. Why do I have to open this up?' The Sheriff told me, 'Look I told you once, I am running the show. Now open it up or we're going to tear it open.' I opened it. And then he told me–they went–he went inside, the dog went inside, and then he told me, 'take me around the perimeter of the whole single storage dwelling.' I took the Sheriff around the perimeter of the southwest portion of the rear of the building, I had–it's a large door where you go underneath the building to get access to the plumbing, and I store stuff up under there also. And the Sheriff asked me, 'Do you have the key to this lock?' I say, 'Yes, sir....'"

R. 167-169.

Petitioner Hamilton's Motion to Suppress was overruled by the Circuit Judge. R. 206. The jury found Hamilton guilty. R. 456. The Circuit Court sentenced him to 25 years with the

State Department of Corrections and a fine of $10,000.00. R. 421. The Mississippi Supreme Court affirmed with written opinion. Mississippi Supreme Court No. 07-58788, Opinion January 17, 1990.

ARGUMENT

THE WRIT SHOULD BE GRANTED, SINCE THE MISSISSIPPI SUPREME COURT REFUSED TO FOLLOW A DIRECTLY CONTROLLING DECISION OF THIS COURT, AND SINCE GRANTING THE WRIT IS THE ONLY WAY IN WHICH THIS COURT MAY COMPEL THE STATE COURTS TO FOLLOW ITS DECISION.

The Mississippi Supreme Court refused to follow a directly controlling decision of this Court. This Court has decisively held that officers act unlawfully when they knowingly search a place different from the place specified in the warrant. In *Maryland v. Garrison*, 480 U. S. 79, 94 L. Ed. 2d 72, 107 S. Ct. 1013 (1987), officers obtained a warrant to search "the premises known as 2036 Park Avenue, 3rd floor apartment". Both at the time the officers applied for the warrant, and at the time they conducted the search pursuant to it, they were ignorant of the fact that this description actually described two (2) separate apartments. They applied for the warrant in good faith, believing that the warrant only described on place. Similarly, they conducted the search in good faith, believing that the warrant only described one place. The officers, without knowing that they were in a place not described in the warrant, searched the premises of Garrison by mistake and discovered contraband.

This Court considered two issues: (1) whether the warrant was illegally issued because it, without the knowledge of either the judge or the officers, described two places; and (2) whether the execution of the warrant was illegal, because the officers, not knowing that the warrant described two places, mistakenly searched the wrong place. The Supreme Court very easily answered the first question, holding the issuance of the warrant was valid since:

> "The validity of the warrant must be assessed on the basis of the information that the officers disclosed, or had a duty to discover and to disclose to the issuing Magistrate. On the basis of that information, we agree with the conclusion of all three Maryland courts that the warrant, insofar as it authorized a search that turned out to be ambiguous in scope, was valid when it was issued.

94. L. Ed. 2d at 81-82.

This Court then said that the question of whether the "execution of the warrant violated the respondent's right to be secure in his home is somewhat less clear." 94 L. Ed. 2d at 82. This Court held that the question of whether the execution of the warrant was unlawful, depended upon whether the officers knew they were in the wrong apartment. Since the evidence disclosed that the officers did not know, and through reasonable care, could not have known, that they were in the wrong apartment, this Court held that the execution of the warrant was also lawful. This court specified, however, that if the officers had known that they were in an apartment not described in the warrant, then the search would have been unlawful. This Court said:

> "Plainly, if the officers had known, or even if they should have known that there were two separate dwelling units on the third floor of 2036 Park Avenue, they would have been obligated to exclude respondent's apartment from the scope of the requested warrant."

94 L. Ed. 2d at 81.

> "If the officers had known, or should have known, that the third floor contained two apartments before they entered the living quarters on the third floor, and thus had been aware of the error in the warrant, they would have been obligated to limit their search to McQuair's apartment. Moreover, as the officers recognized, they were required to discontinue the search of respondent's apartment as soon as they discovered there were two separate units on the third floor, and, therefore, were put on notice of the risk that they might be in a unit erroneously included within the terms of the warrant."

94 L. Ed. 2d at 82.

Thus, this Court held that officers must follow the terms of the warrant. If the warrant specifies one place to be searched, and if the officers realize that they were in a place different from the place specified, they are constitutionally obligated to "discontinue" the search. 94 L. Ed. 2d at 82. This is the precise situation here. This warrant described "a two story dwelling, white with maroon trim, with a concrete basketball court in front." Each officer was capable of distinguishing a "two story building" with a "basketball court in the front" from a one story structure.

By knowingly searching a building different from the building authorized by the warrant,[1] the officers ran directly afoul of one of the clearest meanings of the Fourth Amendment. Of what value is it to require that a warrant be issued by a judge, specifying the "particular place to be searched" if the officers need pay no attention to the language of the warrant? If the judge may authorize the search of one building, but the officers are free to search another, of what use is it to require warrants describing the "particular place to be searched"? If this be permissable, one should also be permitted to sign a warrant in blank, so that the officers may search whatever place they please.[2]

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[1]The reason the warrant authorized a search of only the two story building is that the informant had told the officers that Hamilton was "selling drugs out of the two story building."

[2]This Court's teaching in *Maryland v. Garrison* that officers may not knowingly search a building different from that specified in the warrant is an endorsement of several lower court decisions to the same effect. See, for example, *United States v. Heldt*, 668 F. 2d 1238, 1262 (D. C. Cir. 1981) ("It is well accepted that the authority to search granted by any warrant is limited to the specific places described in it and does not extend to additional or different places."); *United States v. Kaye*, 432 F. 2d 647, 649 (D. C. Cir. 1970))Fourth Amendment does not permit officers to search separate or distinct parts of a building where there is no apparent connection between the part of the building searched, and the part specified in the warrant.); *Keiningham v. United States*, 287 F. 2d 126 (D. C. Cir. 1960) (Where a search warrant allowed a search of house number 1106, the officers could not expand the search warrant to permit a search of house number 1108, even though the owner of the house was using them as a single unit.) By affirming this conviction, the Mississippi Supreme Court ignored both this Court's teaching in *Maryland v. Garrison* and these decisions of the lower federal courts.

The Mississippi Supreme Court never said precisely why this Court's language in *Maryland v. Garrison* did not control this case. However, the Court discussed decisions from other jurisdictions, holding that the warrant might "incorporate by reference" a description contained in an affidavit. Assuming this to be true, such a principal has no application on this case, where the warrant did not incorporate any description contained in the affidavit. If it had done so, it would have made a difference, since the affidavit also contained the specific statement that it was the "two story building" that was the building to be searched. In fact, the description of the building contained in the affidavit and the description of the building contained in the warrant is identical. How the Mississippi Supreme Court could have said that an affidavit, describing the same building which is described in the warrant, somehow broadens the description contained in the warrant is a great mystery.

The Mississippi Supreme Court's observation that the officers had "probable cause" to search the one story residence is also baffling since the officers testified their probable cause consisted of information that drugs were being sold from the two story residence–no mention being made of any sale of drugs in a one story residence.[3]

[3]The Mississippi Supreme Court apparently relied on a statement from a "reliable informer" that "cocaine was being kept and sold in the residence of James Hamilton." This is of no significance, since the record makes clear that the confidential informant considered the "residence" of James Hamilton to be the two story building and not the one story building.

Even if the record supported the Mississippi Supreme Court's claim that the officers had "probable cause" to believe there were drugs contained in the one story residence, the decision, nevertheless, makes a mockery of the United States Constitution Amendment Four's requirement for search warrants. By requiring a warrant, the Amendment requires that a judicial officer, not law enforcement officers, are to make the probable cause determination. It is of no effect that the officers have "probable cause" to believe drugs are in the one story building if the warrant does not authorize a search of the one story building. Absent exigent circumstances, the Fourth Amendment prohibits officers from searching any building, merely because they have probable cause. Rather, officers must obtain judicial authority, a warrant. *Michigan v. Tyler*, 436 U. S. 499, 56 L. Ed. 2d 486, 98 S. Ct. 1942 (1978); *Mincey v. Arizona*, 437 U. S. 385, 57 L. Ed. 2d 280, 98 S. Ct. 2408 (1978). By holding that probable cause alone would justify search of the one story residence, the Mississippi Supreme Court again ignored this Court's precedents.

The state of Mississippi will probably contend, in resisting the Petition, that the mere fact that the Mississippi Supreme Court has misapplied this Court's precedents is insufficient grounds for a grant of the Writ. While it might be properly contended in some criminal cases that misapplication of this Court's precedents is not sufficient grounds for granting the Writ, the claim of an unlawful search and seizure presents entirely different considerations. In *Stone v. Powell*, 428 U. S.

465, 49 L. Ed. 2d 1067, 96 S. Ct. 3037 (1976), this Court held that:

> "Where the State has provided an opportunity for a full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at this trial."

49 L. Ed. 2d at 1080.

The practical effect of *Stone v. Powell* is that absent this Court's grant of certiorari to correct the state courts, the states have no incentive to follow this Court's Fourth Amendment decisions. In view of *Stone v. Powell*, should a state supreme court determine that it disagrees with this Court, and therefore, will not follow a decision of this Court, such lawless action is without a remedy. If the Writ be denied in this case, where a conflict with this Court's precedent in *Maryland v. Garrison* is so clear, the lesson will go out to the lower courts that they need pay no attention to the decisions of this Court in the search and seizure area. The Writ should, thus, be granted since to do otherwise is to permit the lower courts to ignore the decisions of this Court at their leisure.

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CERTIFICATE OF SERVICE

I, Jim Waide, attorney for Plaintiff, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing to the following:

Honorable Michael Moore
Attorney General
P. O. Box 220
Jackson, MS 39205

THIS the 15 day of March, 1990.

JIM WAIDE

APPENDIX "A"

IN THE CIRCUIT COURT OF
OKTIBBEHA COUNTY, MISSISSIPPI
October TERM, 1987

STATE OF MISSISSIPPI
VERSUS NO. 11397
JAMES A. HAMILTON

ORDER

On a previous day came the Defendant in Open Court and was arraigned on an Indictment charging him with the crime of Possession of Marijuana greater than 1 kg. with intent, to which he entered a plea of not guilty. Whereupon came a jury of good and lawful persons, composed of Dorothy Kidd Ainsworth and eleven others, who were each accepted by both sides, and after hearing the evidence pro et con, the argument of Counsel and receiving the Court's Instructions, retired to consider their verdict and presently returned in Open Court the following verdict:

"We, the Jury, find the Defendant guilty as charged."

Whereupon, for said offense, and after review of a pre-sentence report and after hearing evidence in mitigation, aggravation and extenuation, it is Ordered that he, the said James A. Hamilton, be and hereby sentenced to 25 (twenty-five) years in the Mississippi Department of Corrections, Parchman, Mississippi, and pay a fine of $10,000.00, and is remanded to the

Sheriff of Oktibbeha County to await notification and transportation. Bond pending appeal is hereby set at $60,000.00, and the new bond cannot be made until the appeal, if any, is perfected.

SO ORDERED AND ADJUDGED, THIS THE 30TH DAY OF OCTOBER, 1987.

MB: 56
Page: 281

Ernest L. Brown
CIRCUIT JUDGE

APPENDIX "B"

IN THE

SUPREME COURT OF MISSISSIPPI

NO. 07-58788

JAMES A. HAMILTON

V.

STATE OF MISSISSIPPI

BEFORE ROY NOBLE LEE, SULLIVAN and PITTMAN

ROY NOBLE LEE, CHIEF JUSTICE, FOR THE COURT:

James A. Hamilton was indicted, tried and convicted in the Circuit Court of Oktibbeha County, Mississippi, for knowingly and intentionally possessing greater than one (1) kilogram of marijuana with the intent to distribute. The lower court sentenced him to twenty-five (25) years in the custody of the Mississippi Department of Corrections and fined him $10,000. Hamilton has appealed to this Court and assigns one (1) error in the trial below:

THE SEARCH VIOLATED HAMILTON'S RIGHTS UNDER THE UNITED STATES AND MISSISSIPPI CONSTITUTIONS, SINCE THE WARRANT DID NOT AUTHORIZE THE SEARCH OF THE PARTICULAR PLACE WHICH WAS SEARCHED.

Facts

On September 2, 1986, David Gillespie, an investigator for the Clay County Sheriff's Department, received a tip from a confidential informant that there was a quantity of marijuana and cocaine at James Hamilton's residence in the Rock Hill Community of Oktibbeha County. The informant had also seen someone buy drugs at the residence within the past twenty-four hours. Gillespie and the informant rode by Hamilton's house so the informant could show Gillespie where it was located.

There were two residence size buildings on the plot of land where Hamilton lived. Nearest the road was a two-story building with green trim. In front of this building there was a maroon and green basketball court and a parking area. Across the front of the the two-story building was a maroon walkway leading to stairs which go down the side of the building. Approximately 40 feet from the stairs and the nearest corner of the two-story building was a one-story building. This building also had green trim and had a maroon deck on the back.

Officer Gillespie went to Starkville to notify the Oktibbeha County law enforcement officers. Later that same day, "at dusk or later", Gillespie and Steve Westbrook, a deputy with the Oktibbeha County Sheriff's Department, drove by Hamilton's house to get the mileage and a description for a search warrant.

At the suppression hearing, Gillespie testified that he thought there was only one house on the plot of land.

Westbrook testified that when viewed from the road "conceivably, a person could believe that there was one building there." Westbrook testified the warrant was for the residence of James Hamilton. When he "ran" the warrant, he knew there were two buildings but he did not know which building was Hamilton's residence.

When the two officers arrived back in Starkville, they went to Justice Court Judge Bernard Crump's house where Westbrook prepared a search warrant and a supporting affidavit which Gillespie signed. At this point, Gillespie's involvement ended when he was called back to West Point. Both the affidavit for the search warrant and the search warrant describe the place to be searched by stating:

> From Hwy. 82 in Starkville proceed north on Montgomery Street past the city limits and continue north on Rock Hill Road. Proceed in this direction for 3.1 (approx.) miles. On the left is a two-story dwelling, white with maroon trim with a concrete basketball court in front. This dwelling is on the west side of Rock Hill Road. This is the dwelling to be searched.

The pre-printed language of the affidavit for the search warrant and the search warrant itself states in part:

> 5. The facts tending to establish the foregoing grounds for issuance of a Search Warrant are shown on a sheet headed "Underlying Facts and Circumstances" which is attached hereto made a part hereof and adopted herein by reference....

The "Underlying Facts and Circumstances" sheet in its entirety states:

> On Sept. 2, 1986, David Gillespie, a deputy with the Clay Co. Sheriff's Dept. was advised by a confidential and reliable informant whose information has led to arrests and convictions in the past that cocaine is being kept and sold in the residence of James Hamilton on Rock Hill, Oktibbeha Co., MS. This informant also advised that he saw a quantity of marijuana at the residence also. This informant advised that the cocaine sale transpired within the last 24 hours.

On September 2, 1986 at approximately 10:30 p.m., Westbrook, Officer Ricky Peterson, and Oktibbeha County Sheriff Dolph Bryan arrived at Hamilton's property in the Sheriff's car. Other officers waited up the road. First, they went to the two-story building and knocked on the door, but got no response. They then walked down to the one-story building where Hamilton, apparently having seen them, met them at the door. Sheriff Bryan told Hamilton that he had a search warrant for his residence. After Westbrook gave Hamilton a copy, the officers secured the house and radioed the other officers to come on in. Hamilton testified that he told the officers that the warrant was for the two-story building, but Sheriff Bryan told him it was good for whatever the Sheriff said. Officer Westbrook and Sheriff Bryan were asked specifically about this conversation and both denied that Hamilton made any comment or challenged the warrant in any way.

Jacqueline Evans, Hamilton's fiance, and Hamilton's three young children from a previous marriage were inside the house with Hamilton. They were all brought into the living room and they sat on the couch during the search. Officer

Charlie McVey of the Bureau of Narcotics arrived with a dog which was trained to sniff out marijuana, cocaine and various other drugs. The search began in Hamilton's bedroom where the dog indicated that there were drugs in a square wooden box on the floor near the head of the bed. The officers opened the box and found about a quarter (1/4) pound of marijuana in a Zip-Lock bag. They found a loaded .38 special pistol in a closet and a set of triple beam scales. No other drugs were found in the living area of the house.

McVey then took the dog around the edges of the house where McVey discovered what appeared to be a basement-like area under the house with a dirt floor. McVey removed a board that was lying against the opening and allowed the dog to search the basement area. The dog alerted on a suitcase. McVey squeezed through the opening and yelled to the other officers inside the house to come down. The Sheriff heard McVey and went down to where there was a door leading to the basement. The door was padlocked. The officers used a bolt-cutter to cut the lock then went down to where McVey was. The officers opened the suitcase and found eighteen (18) separate packages of marijuana wrapped heavily in plastic with a baby powder type substance on them to disguise the odor. The total weight of the marijuana was eighteen and one-half (18-1/2) pounds. The officers then searched the two-story building. hamilton owned both buildings. The officers found a .38 revolver, a stacked barrel Derringer, and two automatic pistols in a brown Cadillac parked inside the garage. Nothing else was

found in the two-story building.

Officer McVey then decided to further search under the one-story residence. During this search, he found two purple Crown Royal bags inside a cinder block in the corner of the room. The bags held 24 white envelopes, each containing $1,000 in $100.00 bills for a total of $24,000. The search of the property ended around 1:00 or 1:30 a.m., September 3.

Hamilton filed a motion to suppress on October 9, 1987. A hearing on this and other motions was held on October 22, 1987, in which Officers Gillespie, Westbrook and McVey testified, as well as John Montgomery, the district attorney, and Hamilton. The court reserved ruling on the motion to suppress until it received Hamilton's memorandum in support of the motion. In the memorandum, Hamilton argued that the warrant only specified the two-story building to be searched and a search of the one-story building pursuant to that warrant was illegal. On October 29, immediately prior to trial, the court overruled Hamilton's motion to suppress.

Law

Appellant contends that the search of the one-story building when the affidavit and search warrant were for a two-story dwelling, white with maroon trim, violated his constitutional rights. He cites and relies upon ***Strangi v. State,*** 134 Miss. 31, 98 So. 340 (Miss. 1923). In ***Strangi***, the police had a warrant authorizing a search for intoxicating liquor in a particular room of a building which the defendant used as a residence and store. The warrant did not refer t any other buildings and,

after searching the described room and finding no contraband, the police searched a separate building one hundred feet away and seized liquor. The Court held that the search of the separate building one hundred feet away was unlawful and the evidence seized from that search was inadmissible. However, the Court did not indicate what kind or type of building it was, or what its use was, and, obviously, there was no connection between it and the room and building described in the search warrant. There were no facts stated which connected the two buildings.

In the case at bar, the language of the affidavit for search warrant and search warrant is of great importance. Attached to the affidavit and search warrant was a sheet setting out "underlying facts and circumstances." The affidavit and search warrant specifically provided that the underlying facts and circumstances sheet be made a part thereof and adopted into the affidavit and warrant by reference.

The underlying facts and circumstances sheet, signed by Deputy David Gillespie, specifically set out that a reliable informant advised him that cocaine was being kept and sold in the residence of James Hamilton on Rock Hill, Oktibbeha County, Mississippi; that the confidential informant advised that he saw a quantity of marijuana at the residence also; and that the cocaine sale transpired within the last twenty-four hours. In executing the warrant, the officers were directed to, and found, the residence of appellant in which was discovered the contraband, *i. e.*, marijuana.

2 LaFave, *Search and Seizure, A Treatise on the Fourth Amendment,* §4.5(a) p. 209 (2d ed. 1987) states:

> In determining whether the description given the executing officer was sufficiently detailed, it is of course important initially to examine the description which appears in the warrant itself. However, if that description is inadequate, it is appropriate to look to the description appearing in the warrant application or affidavit *if* it is clear that the executing officers were in a position to be aided by these documents, as where they were attached to the warrant at the time of execution and incorporated therein by reference.

(emphasis original)

In *United States v. Gahagan,* 865 F. 2d 1490, 1497 (6th Cir. 1989), *cert. denied,* _____U. S. _____, 109 S. Ct. 3242 (1989), the Sixth Circuit adopted the above principle and held that where a warrant fails to describe the area to be searched with sufficient particularity the insufficiency can be cured by an affidavit if it is attached to the warrant and is incorporated by reference. Other jurisdictions have accepted and adopted the principle of incorporation by reference in a warrant. *See United States v. Johnson,* 690 F. 2d 60, 64 (3d Cir. 1982), *cert. denied,* 459 U. S. 1214, 103 S. Ct. 1212 (1983); *United States v. Wuagneux,* 683 F. 2d 1343, 1350-51 (11th Cir. 1982), *cert. denied,* 464 U. S. 874, 104 S. Ct. 69 (1983); *United States v. Brock,* 667 F 2d 1311, 1323 (9th Cir. 1982); *Application of Lafayette Academy, Inc.,* 610 F. 2d 1, 4 (1st Cir. 1979); *United States v. Johnson,* 541 F. 2d 1311, 1315 (8th Cir. 1976); *State v. Santiago,* 8 Conn. App. 290, 513 A. 2d 710, 717 (1986); *Sadie v. State,* 488 So. 2d 1368, 1372-74 (Ala. App. 1986);

State v. Majors, 430 So. 2d 183, 188 (La. App. 1983), *writ denied*, 435 So. 2d 438; *State v. Woratzeck*, 130 Ariz. 499, 637 P. 2d 301 (1981).

The officer making the affidavit for the search warrant had driven by the appellant's property in a rural area and thought there was only one building on the property, *i.e.*, the two-story building. The property declined away from the road and there appeared to be only the two-story building, which was forth feet from the appellant's residence. The appellant owned all the property, but resided in the one-story building, which was white with trim. When the officers arrived upon the property, they went to the two-story building and received no answer. Appellant came to the front door of the one-story building, his residence, and the officers went there and served him with the warrant. they began to search this building where the appellant and his three children lived and where his fiance was present. The contraband was found in that building. The two-story building was unoccupied.

The State and appellant both cite *Maryland v. Garrison*, 480 U.S. 79, 107 S. Ct. 1013, 94 L.Ed. 2d 72 (1987). There, the Baltimore police obtained a search warrant to search the person of McWebb and "the premises known as 2036 Park Avenue third floor apartment." The officers encountered McWebb in front of the building and used his key to gain admittance to the first floor hallway and the third floor. When they opened the door to the third floor they saw Garrison standing in the hallway and the doors to two apartments open. Only after the

police entered Garrison's apartment and found heroin, cash and drug paraphernalia did they realize there were two apartments. The Court held that the constitutionality of the officers' conduct must be judged in light of the information available to them at the time they acted. *Garrison*, 107 S. Ct. at 1017. The validity of the warrant must be assessed on the basis of the information that the officers disclosed or had a duty to discover and to disclose to the issuing magistrate. The Court stated:

> "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability." *Brinegar v. United States,* 338 U.S. 160, 176, 69 S. Ct., 1302, 93 L.Ed. 1879 (1949).

Garrison, 107 S. Ct. 1018, footnote 11.

The Court held that the officers believed the third floor and McWebb's apartment were one and the same when they obtained the warrant. Since they did not find out that there were two apartments until after they had entered Garrison's living space, the search of Garrison's apartment pursuant to a search warrant for McWebb's was valid. *Garrison*, 107 S. Ct. at 1019.

In *Pool v. State*, 483 So. 2d 331, 334 (Miss. 1986), the Court discussed, and cited cases involving, descriptions in search warrants:

> Descriptions in search warrants need not be positively specific and definite, but are sufficient if the places and

> things to be searched are designated in such manner that the officer making the search may locate them with reasonable certainty.

Cole v. State, 237 So. 2d 443 (Miss. 1970); See also *Williams v. State,* 198 Miss. 848, 23 So. 2d 692 (1945); *Holston v. State,* 161 Miss. 654, 137 So. 501 (1931); *Matthews v. State,* 134 Miss. 807, 100 So. 18 (1924); *Bradley v. State,* 134 Miss. 20, 98 So. 458 (1923).

The description given on the warrant "is not required to be as technical as in a deed of conveyance..." *Holston,* 161 Miss. at 659, 137 So. at 503. The purpose of the description given is:

> [F]irst to inform the officer by the warrant where the premises are, or may be found, and second, to enable the owner to determine whether the officer has legal authority to make a search, so that resistance will not be made, or should not be made, to the search.

Id. See also Matthews, 134 Miss. at 814, 100 So. at 20.

> Finally, where the officers not only could, but did, locate the property by means of the description given in the warrant, that factor is evidence that the legal description is sufficient. *Cole*, 237 So. 2d at 445; *Williams*, 198 Miss. at 851-52, 23 So. 2d at 693.

The record is uncontradicted that the officers had probable cause to search the residence of appellant and they went to and upon the premises for the purpose of searching appellant's residence. The officers found him living in the one-story building with his family. At the suppression hearing, appellant testified that the building was his residence. We are of the opinion

that the affidavit and search warrant, both of which incorporated by reference and made a part of the instruments the underlying facts and circumstances sheet, sufficiently directed the officers to appellant's premises where they found him in his residence, executed the warrant and discovered marijuana. Therefore, the lower court was not in error when it denied a motion to suppress the evidence found in the search, after a full and complete hearing.

The judgement of the lower court is affirmed.

AFFIRMED.

HAWKINS, P. J., DAN LEE, P. J., PRATHER, ROBERTSON, SULLIVAN, ANDERSON, PITTMAN AND BLASS, JJ., CONCUR.

Supreme Court, U.S.
FILED
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NO. 89-1454

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JAMES HAMILTON, Petitioner

v.

STATE OF MISSISSIPPI, Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF MISSISSIPPI

BRIEF IN OPPOSITION

TO BE PRINTED

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ATTORNEY GENERAL
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QUESTION PRESENTED

Does the U. S. Constitution Amendment IV require a law enforcement officer to discontinue a search executed pursuant to a warrant which is otherwise valid except for a misdescription of the particular place to be searched when the search took place where the warrant clearly intended?

TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	3
ARGUMENT	3
I. Notwithstanding the misdescription on the face of the warrant, a search of any residence or property other than Petitioner's was not possible.	3
CONCLUSION	13
CERTIFICATE	14

TABLE OF AUTHORITIES

CASE	PAGE
Application of Lafayette Academy, Inc., 610 F.2d 1 (1st Cir. 1979)	9
Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949)	12
Dalia v. United States, 441 U.S. 238, 60 L.Ed. 2d 177, 99 S.Ct. 1682 (1979)	4
Hamilton v. State, 556 So.2d 685 (Miss. 1990)	1, 5-6, 8, 10-12
Maryland v. Garrison, 480 U.S. 79, 94 L.Ed. 2d 72, 107 S.Ct. 1013 (1987)	4, 5, 7, 12, 13
Sadie v. State, 488 So.2d 1368 (Ala. App. 1986)	9
State v. Majors, 430 So. 2d 183, 188 (La. App. 1983); writ denied, 435 So. 2d 438 (La)	9
State v. Santiago, 8 Conn. App. 290, 513 A.2d 710 (1986)	9
State v. Woratzeck, 130 Ariz. 499, 637 P.2d 301 (1981)	9
Steele v. United States No. 1, 267 U.S. 498 (1925)	6
United States v. Alexander, 761 F.2d 1294 (9th Cir. 1985)	10, 11
United States v. Brock, 667 F.2d 1311 (9th Cir. 1982)	9
United States v. Gahagan, 865 F.2d 1490 (6th Cir. 1989)	5, 8
United States v. Gilman, 684 F.2d 616 (9th Cir. 1982)	11
United States v. Johnson, 541 F.2d 1311 (8th Cir. 1976)	9
United States v. Johnson, 690 F.2d. 60 (3d Cir. 1982), cert. denied, 459 U.S. 1214, 103 S.Ct. 1212, 75 L.Ed 2d 450 (1983)	8
United States v. Whitney, 633 F.2d 902 (9th Cir. 1980)	6, 11
United States v. Whitten, 706 F.2d 1000 (9th Cir. 1983), cert. denied, ___ U.S. ___, 104 S.Ct. 1593, 80 L.Ed.2d 125 (1984)	11

United States v. Wuagneux, 683 F.2d 1343 (11th Cir. 1982), cert. denied, 464 U.S. 814, 104 S.Ct. 69, 78 L.Ed.2d 83(1983) 9

STATUTE **PAGE**

28 U.S.C. 1257(3) 1

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

JAMES HAMILTON, Petitioner,
v.
STATE OF MISSISSIPPI, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

Respondent, State of Mississippi, respectfully prays that the Petition for Writ of Certiorari to the Supreme Court of Mississippi be denied in this case.

OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported as Hamilton v. State, 556 So.2d 685 (Miss. 1990). A copy of the opinion is before the Court as an Appendix to the Petition for Writ of Certiorari.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Ceirtiorari through the authority of 28 U.S.C. 1257(3). He has failed to do so.

STATEMENT OF THE CASE

On September 2, 1986, (R.E. 2) a search warrant was issued which accurately directed law enforcement officers to property that James Hamilton, Petitioner, admittedly solely owns and

controls. (R. 165-166) This warrant did in fact contain language on its face commanding the executing officers to search a two-story building located there, along with "all approaches and appurtenances thereto". (R.E. 2)

The warrant and the affidavit attached, also contains this pre-printed language:

> 5. The facts tending to establish the foregoing grounds for issuance of a search warrant are shown on a sheet headed "Underlying Facts and Circumstances" which is attached hereto, made a part hereof and adopted herein by reference. (R.E.2)

The "Underlying Facts and Circumstances" sheet handwritten and signed by the investigation officer states in its intirety:

> On September 2, 1986, David Gillespie, a deputy with the Clay County Sheriff's Department was advised by a confidential and reliable informant whose information has led to arrests and convictions in the past that cocaine is being kept and sold in the residence of James Hamilton in Rockhill, Oktibbeha County, Mississippi. This informant also advised that he saw a quantity of marijuana at the residence also. This informant advised that the cocaine sale transpired within the last 24 hours. (R.E.1)

A description of the two-story building only appears on the face of the warrant because the investigating officer, the affiant, believed there to be only one house on Hamilton's property, that this house was Hamilton's residence, and that he was keeping drugs there. (R. 161-162) Gillespie testified that when he viewed the property while driving by at dusk, only a two-story building could be seen. (R. 152)

When the officers arrived at the scene of the search they approached the two-story building, knocked on the door and received no reply. (R.348) The officers then proceeded to the single story residence less than forty feet away where they were met at the door by Hamilton. (R.348) At this time the warrant was served and executed. (R.309, 348) Various contraband and a large amount of cash were found. (R.313,316,317,318,333)

Testimony by Hamilton admits to ownership of the lot, the two-story and one-story buildings situated there, and that he has occupied both buildings. (R.165-166) He further testified that the single-story building is his residence. (R.177)

REASONS FOR DENYING THE WRIT

Because the petitioner has failed to demonstrate that the decision of the Supreme Court of Mississippi in this case conflicts with the reasoning exposited in prior decisions of this Court or any federal court of appeal concerning technical sufficiency of search warrants, no valid constitutional issue has been raised and, Therefore, the petition should be denied.

ARGUMENT

I. Notwithstanding the misdescription on the face of the warrant, a search of any residence or property other than Petitioner's was not possible.

This Court has interpreted the fourth amendment as requiring three things of a valid search warrant. First, the warrant "must be issued by neutral, disinterested magistrates." Second, it must be demonstrated to the magistrate by those seeking issuance that probable cause exists to believe that "the evidence sought

will aid in a particular apprehension or conviction for a particular offense". Lastly, warrants must particularly describe the things to be seized and the places to be searched. Dalia v. United States, 441 U.S. 238, 255, 60 L.Ed. 2d 177, 99 S.Ct. 1682 (1979). Petitioner takes no issue with the first two requirements, only the third. Claiming that the warrant failed to sufficiently particularize the premises to be searched and using Maryland v. Garrison, 480 U.S. 79, 94 L.Ed. 2d 72,107 S.Ct. 1013 (1987), as the mainstay of his argument.

His argument rests entirely on the supposition that the instant search occurred in a place different from that specified in the warrant. Petitioner Hamilton contends that when the executing officers were informed of what he perceived to be their mistake, they were then obligated to discontinue the search. If, in fact, the officers had gone to the wrong premises they surely should have taken their warrant elsewhere. But one fact taken out of context and applied to a partial holding taken out of context is not basis for argument. While Garrison parallels this case to some extent factually and the reasoning applied by this Court pertains here, other decisions of this Court and federal courts of appeal must be applied in order to address the totality of the circumstances.

Here, as in Garrison, there is no question that a valid warrant based on probable cause issued. Nor is the Petitioner claiming that the officers involved failed in their duty to conduct a reasonable investigation, including verification of the

information provided by a reliable confidential informant. Hamilton v. State, 556 So. 2d 685, 690 (Miss. 1990). The informant told the investigator, David Gillespie, that he had seen a drug buy at Hamilton's residence within the past twenty-four hours. Hamilton, 556 So. 2d at 686. Gillespie testified at the suppression hearing that even after driving with the informant by the property owned by Hamilton, he thought there was only one house on the plot. Other testimony supported the reasonableness of this conclusion. 556 So. 2d at 686.

The analysis, as per Garrison, then is directed at the language of the warrant itself, its supporting affidavits, and what these documents indicated as the intended place to be searched. 480 U.S. at 82.

Petitioner believes the warrant issued in this case to be analogous to a blank warrant. Indeed, the "manifest purpose of this particularity requirement was to prevent general searches", and to deter police officers from conducting "wide-ranging exploratory searches". 480 U.S. at 84. This warrant, though, was anything but blank, nor was it of general character authorizing an "exploratory search". A warrant must be read in its entirety, with the attached affidavits and other supporting documents. United States v. Gahagan, 865 F.2d 1490, 1497 (6th Cir. 1989).

The warrant to search the Petitioner's residence gave precise directions to the location of Hamilton's property and a description of a two-story building mistakenly thought to be his residence. The question then, as in Garrison, is "whether that

factual mistake invalidated a warrant that undoubtedly would have been valid if it had reflected a completely accurate understanding" of the layout of the Petitioner's property. 480 U.S. at 85. That question is answered here in the negative. "It is enough if the description is such that the officer with a search warrant can, with reasonable effort, ascertain and identify the place intended". Steele v. United States No. 1, 267 U.S. 498, 503 (1925).

Reasonable effort includes not only reading the warrant but also the attached affidavits. This warrant expressly incorporated by reference the affidavit. In pre-printed language on both the warrant and affidavit, a sheet headed "Underlying Facts and Circumstances" was also expressly incorporated by reference. Hamilton, 556 So.2d at 686-687. When taken in their totality, all these documents clearly indicated that the residence of James Hamilton, along with "all approaches and appurtenances thereto," was the intended place to be searched.

In United States v. Whitney, 633 F.2d 902 (9th Cir. 1980), the appellant argued that the warrant was invalid because it described the place to be searched as a "single-family dwelling" when in fact it was a two-family residence. This facial discrepancy occurred because the investigating officers were unaware of the existence of this condition until actual entry was made. 633 F.2d at 907, 908. Because the appellant, Whitney, had full control of the house, the court decided that officers had probable cause to search the entire residence. And that without

evidence in the record of police misconduct, deception, or misstatement in securing the warrant, the search is valid. 633 F.2d at 908.

No such evidence exists here either. Nor is it at issue that sufficient probable cause existed. Petitioner admits to ownership and control of both the two-story building and the one-story building, and the property on which they are situated. (R. 165-166). This fact is what distinguishes Garrison from this case. McWebb did not have complete control over the third floor.

The officers were compelled to stop the search of Garrison's apartment at the time they realized this. 480 U.S. at 87. This Court noted that the "objective facts available to the officers at the time suggested no distinction between McWebb's apartment and the third-floor premises". 480 U.S. at 87. As a result, prior to the discovery of the mistake, the officers were found to have acted reasonably in executing the warrant upon the entire floor. 480 U.S. at 87.

At no time during the search of Hamilton's property did they attain the level of unreasonability proscribed in Garrison. Therefore, the officers were not required to discontinue the search at that point when Hamilton pointed out the technical flaw in the description of the building to be searched. It was reasonable for the officers to conclude, based on the warrant and attendant documents, that Hamilton's residence located on property owned and controlled by Hamilton was the place intended

to be searched; not just an unoccupied two-story building located within forty feet of his residence, which is appurtenant to and under the same ownership and control.

The principle of incorporation by reference into a warrant of affidavits and other documents had the effect of curing the technical flaw in the description of the particular place to be searched:

> "In determining whether the description given the executing officer was sufficiently detailed, it is of course important initially to examine the description which appears in the warrant itself. However, if that description is inadequate, it is appropriate to look to the description appearing in the warrant application or affidavit if it is clear that the executing officers were in a position to be aided by these documents, as where they were attached to the warrant at the time of execution and incorporated therein by reference".

Hamilton, 556 So.2d at 688, citing 2 LaFave, Search and Seizure, A Treatise on the Fourth Amendment, 4.5(a) p. 209 (2d ed. 1987). (emphasis in original)

The Supreme Court of Mississippi in adopting this principle is in accord with the Sixth Circuit which likewise adopted it in United States v. Gahagan, 865 F.2d 1490, 1497 (6th Cir. 1989), cert. denied, ___ U.S. ___, 109 S.Ct. 3242, 106 L. Ed. 2d590 (1989), holding that an insufficiency in a warrant can be cured by an attached affidavit that is incorporated by reference. Other jurisdictions have adopted this principle. See United States v. Johnson, 690 F.2d. 60, 64 (3d Cir. 1982), cert. denied, 459 U.S. 1214, 103 S.Ct. 1212, 75 L.Ed 2d 450 (1983); United States v. Wuagneux, 683 F.2d 1343, 1350-51 (11th Cir. 1982),

cert. denied, 464 U.S. 814, 104 S.Ct. 69, 78 L.Ed. 2d 83(1983); United States v. Brock, 667 F.2d 1311, 1323 (9th Cir. 1982); Application of Lafayette Academy, Inc., 610 F.2d 1, 4 (1st Cir. 1979); United States v. Johnson, 541 F.2d 1311, 1315 (8th Cir. 1976); State v. Santiago, 8 Conn. App. 290, 513 A.2d 710, 717 (1986); Sadie v. State, 488 So.2d 1368, 1372-74 (Ala. App. 1986); State v. Majors, 430 So. 2d 183, 188 (La. App. 1983); writ denied, 435 So. 2d 438 (La); State v. Woratzeck, 130 Ariz. 499, 637 P.2d 301 (1981).

Several things are apparent in this case. Probable cause existed to search all buildings on the plot. The confidential informant had been consistently reliable in the past. The investigation leading up to the warrant was conducted by officer Gillespie in a reasonable manner. The attached affidavit and the "Underlying Facts and Circumstances" sheet were an honest presentation of the facts as Gillespie believed them to be. All thee documents, the warrant, affidavit, and "Underlying Facts and Circumstances", clearly indicated to the executing officers that not only was the two-story building one of the particular places to be searched, but also all approaches and appurtenances thereto, and the residence of James Hamilton. The directions on the face of the warrant could not have, and did not, direct the officers to anyone else's property but the Petitioners'. Petitioner admitted at the time of the search to ownership and control of the property and all the buildings situated there. Therefore, from the warrant and attached documents, and based on

the Petitioners own words, the executing officers reasonably believed that they were at the residence of James Hamilton and that this was without a doubt the particular placed intended to be searched. It was not unreasonable for the officers to believe that the two buildings, served by a common driveway, within forty feet of one another, and under the singular control of the person named on the warrant, were subject to search. The warrant and supporting documents amply particularized that it was intended that Hamilton's place was to be searched.

The Ninth Circuit in United States v. Alexander, 761 F.2d 1294 (9th Cir. 1985), addressed a contention that a warrant was overbroad. Alexander asserted that the warrant was too wide-ranging because it did not mention the small trailer where he was found, and because it authorized the search of his entire forty acre ranch instead of a smaller portion of it. 761 F.2d at 1300.

Alexander did not contend that the ranch was improperly identified. The Alexander court found probable cause existed to search the whole ranch. 761 F.2d at 1301. Hamilton likewise does not claim his plot of land was misidentified. Similarly, in this case, the Supreme Court of Mississippi found no evidence in the record contradicting that officers had probable cause to search the Petitioner's residence. Hamilton, 556 So.2d at 690.

Other parallels between the two cases exist. Alexander owned and admitted to control over the property and everything situated upon it. Also, he was found living on that same

property in a place not listed in the warrant. The Ninth Circuit held that the warrant's failure to mention the trailer did not make it overbroad. Alexander, 761 F.2d at 1301. The warrant was held valid because probable cause existed to search all of the buildings on Alexander's ranch and because all the buildings there were under his control. 761 F.2d at 1301, citing Whitney, 633 F.2d 907, 908.

The Alexander court took note that in Whitney, they upheld the challenged warrant which described only a single dwelling when in fact two dwellings existed on the same premises, where the defendant enjoyed full control over both. Alexander, 761 F.2d at 1301, citing Whitney, 633 F.2d at 907-908. No evidence was found that the officers had prior knowledge of the two dwellings. Whitney, 633 F.2d at 908.

Similarly, that court held that a "warrant is valid when it authorizes the search of a street address with several dwellings if the defendants are in control of the whole premises, if the dwellings are occupied in common, or if the entire property is suspect". Alexander, 761 F.2d at 1301, citing United States v. Whitten, 706 F.2d 1000, 1008 (9th Cir. 1983), cert. denied, ___ U.S. ___, 104 S.Ct. 1593, 80 L.Ed. 125 (1984); United States v. Gilman, 684 F.2d 616, 618 (9th Cir. 1982).

Hamilton was found in a building, his residence, not listed directly on the warrant. Hamilton, 556 So.2d at 687. The warrant contained language directing officers to search approaches and appurtenances. (R.E.3) Hamilton has not contended

that his plot of land was misidentified, but has in fact admitted to ownership and control over it and the buildings situated there. 556 So.2d at 689. The Supreme Court of Mississippi upheld the findings of probable cause below. 556 So.2d at 690. Their holding in this case is directly in line with the decisions of this Court and other federal courts of appeal.

The Supreme Court of Mississippi noted that this Court held in Garrison, 480 U.S. at 87, that the constitutionality of the officers conduct must be judged in light of the information available to them at the time they acted. Hamilton, 556 So. 2d at 689. A warrant's validity "must be assessed on the basis of the information that the officers disclosed or had a duty to discover and to disclose to the issuing magistrate". 556 So.2d at 689, citing Garrison, 480 U.S. at 87.

There was every reason for the officers to believe that a search of both buildings on Hamilton's premises was warranted. In Whitney, 633 F.2d at 908, the court there could not say, under circumstances similar to those presented here, that "either the informant's characterization or the officers' understanding was unreasonable". The same logic applies to this case. The record is bereft of any evidence, nor has the petitioner claimed, that the officers acted in any manner other than in reasonably good faith. If it is assumed that any mistake was made, or that the warrant was defective for any reason, then the following statement from Brinegar v. United States, 338 U.S. 160, 176, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879 (1949), applies:

> "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability".

Garrison, 480 U.S. at 87, n.11.

CONCLUSION

Respondent respectfully submits that because the Supreme Court of Mississippi's decision in this case is squarely in line with prior decisions of this Court and other federal courts of appeal, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE

I, John T. Kitchens, a Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be maoiled, via United States Postal Service, first-class postage prepaid, a true and correct copy of the foregoing Brief in Opposition to the following:

Jim Waide, Esquire
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Tupelo, Mississippi 38802

This, the 11th day of June, 1990.

John T. Kitchens
JOHN T. KITCHENS